Civil Action — No. 16102

United States Court of Appeals
For the Ninth Circuit

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 839, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 370,
Appellants,

vs.

MORRISON-KNUDSEN COMPANY, INC., a Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

APPELLANTS' REPLY BRIEF

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THE ARGUS PRESS, SEATTLE

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Appeal from the United States District Court for the Eastern District of Washington Southern Division

APPELLANTS' REPLY BRIEF

We undertake the preparation of this Reply Brief with diffidence and humility. This is so because Appellee's counsel throughout their Brief repeatedly have given assurances to the Court that the reasons we have advanced why the judgment should be reversed are entirely without merit or substance. With equal propriety we also might assure the Court that the answers the Appellee's counsel attempt to make are without merit or substance. In that event, one set of assurances would probably cancel the opposing set of assurances and thus leave the Court just where it was in the beginning, to decide for itself who is right and who is wrong. We doubt if the Court will be greatly aided by the

assortment of adjectives the Appellee's counsel uses to indicate their disagreement with us, among which are "ingenious," "technical," "tenuous," "disconnected," "complicated," "unique," "illogical," etc. It should be noted that the Appellee's counsel, at page 2 of their Brief, do admit that our Statement of the Case is reasonably accurate. If there are any inaccuracies, they suggest that the Court is free to search the record for itself and discover some inaccuracies if it can. Whether the bringing of this action amounted to a manifestation of heroic courage on the part of the Appellee or amounted to a dishonorable repudiation of an admitted commitment made by its Director of Labor Relations to the interested Unions at the pre-job conference at Pasco on January 5, 1956, may also justify a difference of opinion.

Although Appellee's counsel purport to separately argue our Assignments of Error I and II concerning the status of the Hanford Atomic Energy Project as a Federal enclave, the fact is that they confuse these two Assignments.

Our Point I concerns the status of the Hanford area as a matter of law. Points II and VI have to do with a related but nevertheless different question and that is what the parties intended when the two labor contracts (Exhibits 2 and 3) were being negotiated. In this Reply Brief we will attempt to keep these two questions distinct.

APPELLANT'S POINT I CONCERNING STATUS OF HANFORD ATOMIC ENERGY PROJECT AS A MATTER OF LAW

In our Opening Brief (pages 19-33) we referred to Article I, Section 8, of the U.S. Constitution and many decisions concerning lands acquired by the Federal government for national defense purposes. We have not overlooked, as Appellee's counsel seem to think, that the Constitution of the State of Washington provides for such acquisitions and that the Washington statute of 1939 quoted in Appellee's Brief, pages 7 and 9, also relates to that subject. The only section on that statute that has any possible relation to the question now involved is Section 37.04.030 (Appellee's Brief, page 8) by which the state reserves jurisdiction *"not inconsistent with the jurisdiction ceded to the United States."* The provisions of that statute defining what shall happen if the United States for five consecutive years shall fail to use the acquired lands have no relevancy because there has been no abandonment for five years, or at all.

For reasons which will now be discussed, we believe the Court will be convinced that 40 U.S.C.A., Section 255, quoted in the Appellee's Brief (pages 5-6) can have no application to the Hanford area after December 31, 1946, even conceding for the purposes of argument only that it may have had some possible application before that date while the area remained under the control of the War Department.

The present controversy arose out of two contracts (Exhibits 2 and 3) executed in the month of December,

1955, and in effect beginning on January 1, 1956. The question is: What was the legal status of the Hanford area at that time? The lands constituting the project were acquired by the Federal government beginning in February, 1943, while the war between the United States and Japan was in progress. It is a matter of familiar history that atomic bombs were dropped on several Japanese cities in August, 1945, and shortly thereafter the war with Japan ended when the Japanese surrendered to General MacArthur on August 14, 1945. During the war period, the Hanford project was operated by the War Department. The history of the operation during that period, so far as publicly known, is material to the extent, and only to the extent, that it sheds light on the status of the area after the war had been concluded and after the area was transferred to the Atomic Energy Commission created by the original Atomic Energy Act of 1946. That transfer took place on December 31, 1946, exactly nine years prior to the effective date of the two labor contracts now involved.

The war in the Pacific having ended in August, 1945, Congress a year later passed the original Atomic Energy Act entitled "An Act for the development and control of atomic energy." This Act will be found in Volume 60, United States Statutes at Large at page 755. Section 9(a) of that Act (60 Statutes at Large, page 765) provided that:

> "The President shall direct the transfer to the Commission of all interests owned by the United States or any Government agency in the following property:
>
> "(1) All fissionable material; all atomic weapons

and parts thereof; all facilities, equipment, and materials for the processing, production, or utilization of fissionable material or atomic energy; all processes and technical information of any kind, and the source thereof (including date, drawings, specifications, patents, patent applications, and other sources (relating to the processing, production, or utilization of fissionable material or atomic energy; and all contracts, agreements, leases, patents, applications for patents, inventions and discoveries (whether patented or unpatented), and other rights of any kind concerning any such items;

"(2) All facilities, equipment, and materials, devoted primarily to atomic energy research and development; and

"(3) Such other property owned by or in the custody or control of the Manhattan Engineer District or other Government agencies as the President may determine."

The special Senate Committee on Atomic Energy, in recommending that 1946 Act for passage, explained the purpose of Section 9 as follows:

"The Commission is to take over all the resources of the United States Government devoted to or related to atomic energy development. This includes all atomic weapons, all property of the Manhattan Engineer District, and all patents, materials, plants and facilities, contracts, and information relating primarily to atomic energy. The Commission is authorized to reimburse States and municipalities for loss in taxes incurred through its acquisition of property."

United States Code Congressional Service, 79th Congress, Second Session, 1946, page 1334.

As directed by that Section 9(a) of the Atomic Energy Act of 1946, the President issued Executive Order No. 9816, dated December 31, 1946, 12 F.R. 37, which so far as now material reads:

"TRANSFER OF PROPERTY AND PERSONNEL TO THE ATOMIC ENERGY COMMISSION

"By virtue of the authority vested in me by the Constitution and the statutes, including the Atomic Energy Act of 1946, and as President of the United States and Commander in Chief of the Army and the Navy, it is hereby ordered and directed as follows:

"1. There are transferred to the Atomic Energy Commission all interests owned by the United States or any Government agency in the following property:

"(a) All fissionable material; all atomic weapons and parts thereof; *all facilities,* equipment, and materials *for the processing, production, or utilization of fissionable material or atomic energy;* all processes and technical information of any kind, and the source thereof (including data, drawings, specifications, patents, patent applications, and other sources) relating to the processing, production, or utilization of fissionable material or atomic energy; and all contracts, agreements, leases, patents, applications for patents, inventions and discoveries (whether patented or unpatented), and other rights of any kind concerning any such items.

"(b) All facilities, equipment, and materials, devoted primarily to atomic energy research and development.

"2. *There also are transferred to the Atomic*

Energy Commission all property, real or personal, tangible or intangible, including records, owned by or in the possession, custody or control of the Manhattan Engineer District, War Department, in addition to the property described in paragraph 1 above. Specific items of such property, including records, may be excepted from transfer to the Commission in the following manner * * *

"3. *The Atomic Energy Commission shall exercise full jurisdiction over all interests and property transferred to the Commission* in paragraphs 1 and 2 above, in accordance with the provisions of the Atomic Energy Act of 1946." (Emphasis supplied)

42 U.S.C.A., page 192, following Section 2031.

After the passage of the original Atomic Energy Act of 1946, Congress from time to time amended various sections dealing principally with the details of administration, but Section 9(a), pursuant to which the President by his Executive Order No. 9816 transferred the described property from the War Department and vested *full jurisdiction* in the Atomic Energy Commission, remained unchanged.

In 1954 the Atomic Energy Act of 1946 was completely revised by an Act entitled "An Act to amend the Atomic Energy Act of 1946, as amended, and for other purposes." (Volume 68, United States Statutes at Large, pages 919-961.) This new Act took effect on August 30, 1954. That there might be no misunderstanding as to the continuance of the *full jurisdiction* vested in the Atomic Energy Commission by the President's Executive Order No. 9816 of December 31, 1946, Congress specifically provided in the revised Act of 1954 that:

> "Sec. 241. Transfer of Property.—Nothing in this Act shall be deemed to repeal, modify, amend, or alter the provisions of section 9(a) of the Atomic Energy Act of 1946, as hertofore amended."

This provision of the 1954 Act now appears as Sec. 2015 of 42 U.S.C.A., page 188.

The Appellee's counsel in their Brief, pages 9-10, direct attention to Exhibit 20 consisting of a series of letters from the War Department to the Governor of Washington relating to the Hanford area while that project was being acquired and was being operated by the War Department and long before the Atomic Energy Commission had been created. The first of these letters dated May 26, 1943, was written three years and seven months before the President's Executive Order No. 9816. The last letter was written on July 31, 1945, one year and five months before the Presidential order. These letters purport to have been written under authority of 40 U.S.C.A., Section 255, quoted in Appellee's Brief at page 5. So far as the Hanford project is concerned, that section ceased to have any vitality whatever after the transfer of the area from the War Department to the Atomic Energy Commission on December 31, 1946. Whatever may have been the dubious status, if it was dubious, of the Hanford area during the war period, there is no possible doubt as to its status after the President, on December 31, 1946, at the specific direction of Congress, transferred the area from the War Department to the newly-created Atomic Energy Commission and vested that Commission with *full jurisdiction.*

The applicable rule of statutory construction is

clearly stated in *United States v. Tynen,* 11 Wall. 88, page 92, 20 L.ed., 153, page 154:

> "There is no express repeal of the 13th section of the Act of 1813 declared by the Act of 1870, and it is a familiar doctrine that repeals by implication are not favored. When there are two Acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter Act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two Acts are not in express terms repugnant, *yet if the latter Act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first Act, it will operate as a repeal of that Act.*" (Emphasis supplied)

The principle of law so clearly stated in the *Tynen* case has been reiterated in *King v. Cornell,* 106 U.S. 395, page 396, 27 L.ed. 60, and in *United States v. Yuginovich,* 256 U.S. 450, page 463, 65 L.ed. 1043, page 1047.

It cannot be gainsaid that the Atomic Energy Act of 1946 and that Act as revised and amended in 1954 "covers the whole subject" and "embraces new provisions" and plainly shows that by those Acts Congress intended the newly-created Atomic Energy Commission to exercise the *full jurisdiction* defined in the President's Order No. 9816 dated December 31, 1946.

In their Brief, beginning at page 10, Appellee's counsel state that there are some further facts which they think compel the conclusion that Congress did not mean what it said. Reference is made (Appellee's Brief, page 11) to some oral testimony of Francis H. Bacom,

a layman and an officer of the Atomic Energy Commission who, at the instance of Appellee's counsel, undertook to give a dissertation on the criminal laws of Washington that were or were not applicable to the Hanford area after the Atomic Energy Commission had assumed full jurisdiction. The extent to which state laws may become applicable to crimes committed within the limits of a Federal enclave is defined by an Act of Congress known as the Assimilated Crimes Act of 1948, 18 U.S.C.A., Section 13, which provides that persons within Federal enclaves who are guilty of acts or omissions which are not punishable under Federal laws but which are punishable under the laws enforced in the state wherein the enclave is located, shall be guilty of a like offense and subject to like penalty. Some difficult questions have arisen as to the proper application of this statute but we are not now dealing with the question of whether such crimes must be prosecuted in the Federal courts or may be prosecuted in state court. What Mr. Bacom, a layman, may or may not think about criminal jurisdiction is decisive of nothing. Neither is it of any consequence whether Mr. Bacom, who had acquired a legal residence in the State of Washington, did or did not vote.

On page 11 of their Brief, Appellee's counsel refer to the contributions made by the Atomic Energy Commission for the maintenance of public schools. On the following page, they refer to the fact that the Washington Workmens' Compensation Act by special arrangements has been made applicable to the Hanford area. These matters are discussed in our Opening Brief at pages 30-32 and do not require further comment.

The matter of health and welfare payments to which counsel refer in their Brief at pages 13-14 is wholly beside the question. Those provisions of the Taft-Hartley Law permit employers to make contributions to health and welfare funds. Those contributions are not made to the Unions; they are made to a trustee. The evidence is specific that in this case the contributions were made not to the Unions, but to a trustee (Rossman Tr. 641, 648, Lewis Tr. 668). In this connection Appellee's counsel cite and quote 29 U.S.C.A., Section 186, but they omit from their quotation sub-section (d) which reads:

> "(d) Any person who *willfully* violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both."

If the Appellee, Morrison-Knudsen, *willfully* made payments in violation of the quoted section, and if the trustee *willfully* accepted such payments, it is difficult to understand how their violations can create a contract applicable to the Hanford area if a contract does not otherwise exist. If those payments were not made willfully with intent to violate the regulations relative to health and welfare payments, the fact that they were made by the Appellee and accepted by the trustee proves nothing.

The purport of Appellee's argument on this Assignment is that there can never be a Federal enclave unless the Federal jurisdiction is totally exclusive. That has not been the law from the beginning. The states may and traditionally have reserved authority to serve

criminal and civil process within a Federal enclave. In some cases, as in *Fort Leavenworth Railroad Company v. Lowe,* 114 U.S. 525, 29 L.ed. 264, certain rights of taxation have been reserved. As stated in the Washington statute, the states with the acquiescence of the Federal government may reserve any jurisdiction "not inconsistent with the jurisdiction ceded to the United States."

If Appellee's counsel claim that the change of status resulting from the provisions of the Atomic Energy Act of 1946, the President's Executive Order No. 9816 of December 31, 1946, and its confirmation by the revised Atomic Energy Act of 1954, is meaningless, on the oral argument they should state so specifically.

REPLY ARGUMENT RE POINTS II AND VI

This subject is discussed in our Opening Brief (pages 33-42) and in the Appellee's Brief (pages 17-29). The question is: What did the parties mean by the expression "Benton County" in November and December, 1955, when the two labor contracts were negotiated? Did they mean that county as it existed territorially prior to February, 1943, twelve years before the contracts were negotiated, or did they mean Benton County as it existed territorially nine years after it was transferred from the War Department to the Atomic Energy Commission? Appellee's counsel cite nine decisions from the Supreme Court of Washington to sustain the elementary proposition that when the language of a written contract is plain and unambiguous, oral evidence will not be received to contradict it, and that oral evidence will not be received to create an ambiguity

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where none in fact exists. We, of course, do not dispute that elementary rule of contract law. It is equally well established that when the words used in a contract are capable of one or the other of two possible meanings, the Court must ascertain what the parties indended when the contracts were being negotiated. The question here is which of these two rules is applicable to the case. The repeated assertions of Appellee's counsel that the term "Benton County" as used in the contracts means that county as it existed prior to February, 1943, prove nothing. We believe the authorities we have cited, and particularly *United States v. Bethlehem Steel Company,* 205 U.S. 105, page 117, 51 L.ed. 731, page 736, make it clear that in view of the admitted facts in this case, the parol evidence rule is inapplicable.

On page 3 of their Brief Appellee's counsel quote from a memorandum brief filed in the trial court by the defendants which said, "For legal purposes it (the Hanford area) is no more a part of Benton County than if it were an island of equal size in the Pacific Ocean." That statement was made, and we still adhere to it. It was made at an early stage of the case before the filing of the amended pleadings upon which the case was ultimately tried and neither that statement nor those earlier pleadings are a part of the record before this Court. At that time the comparison of the Hanford area to an island of equal size in the Pacific gave the Appellee's counsel a profound emotional upset from which apparently they have not yet recovered. If it is proper for Appellee's counsel to quote from those early briefs, we assume that it is equally proper for us to do likewise. At that stage of the case, Appellee's counsel in their memorandum brief said:

> "At the outset we wish to emphasize the question before the Court for determination is not the extent of jurisdiction between the Federal Government and the State of Washington, or the applicability of State or County legislation to the Hanford Works Project Area, but rather DO THE LABOR AGREEMENTS BETWEEN PLAINTIFF AND DEFENDANTS APPLY TO THE HANFORD WORKS PROJECT AREA? * * *
>
> "Here the question is whether when the parties to the LABOR AGREEMENTS negotiated the same they understood and intended that the Hanford Works Project Area was not intended to be included within the geographical area as described in Article II, since such area was 'no more a part of Benton County than if it were an island of equal size in the Pacific Ocean'." (Emphasis supplied by Appellee's counsel)

At that time, Appellee's counsel agreed with the very contention we are now making. They have now reversed their position—we have not.

On page 3 of their Brief, Appellee's counsel state that, "There is not a word of evidence in the record to which Appellants can point to establish that the parties had in mind or contracted in the light of the technical legal point as raised and relied upon by the Appellants." They make this statement in the face of the fact that upon their motion the Court struck the Appellant's affirmative defense and excluded Appellant's evidence.

On page 4 of their Brief, Appellee's counsel refer to the maps which are attached to the two contracts. If Appellee must refer to a map to aid in ascertaining what the written language means, that in itself is an

admission that the written language is of doubtful meaning and requires explanation.

On page 19 of their Brief, Appellee's counsel refer to a colloquy occurring between Court and counsel after Appellee had made the motion to strike the affirmative defense and before the Court had ruled on that motion. At that time we did say that we were relying upon the affirmative defense as pleaded. We still are relying on it, but we are also relying on that defense as supplemented by the trial amendment allowed by the Court and quoted in our Opening Brief at page 10. Our claim is that when the contracts were being negotiated in November and December, 1955, neither the representatives of the contractors nor the representatives of the Unions were considering the Hanford area at all. In discussing this specification in our Opening Brief, we have pointed out that Mr. Sam C. Guess, the Executive Secretary of the Associated General Contractors, as a witness for the Appellee, never made any claim that the two labor contracts executed on December 19, 1955, and December 24, 1955, and effective on January 1, 1956, as written were intended to be applicable to the Hanford area. His evidence is directly to the contrary. That evidence is that shortly following the pre-job conference on January 5, 1956, the Contractors' Committee proposed that the two contracts be *amended* for the specific purpose of making them applicable to the Hanford area. Those negotiations were continued for a period of several weeks and until March 16, 1956, when the Unions' refusal to agree to an amendment was definitely communicated to the Contractors' Committee. If the contracts as written and in effect on

January 1, 1956, included the Hanford area, why were the contractors so persistently seeking an amendment? The Appellee's Brief is completely silent on this vital question.

In this connection, Appellee's counsel at page 2 and again at page 50 of their Brief quote from the evidence of Mr. Arthur A. Rossman, Business Agent of the Operating Engineers, when he testified that during these negotiations after January 5, 1956, and prior to March 16, 1956, he repeatedly stated that he could not agree to any amendment that would reduce his members' take-home pay. The Appellee's counsel seem to think that there was something reprehensible about the position then taken by Mr. Rossman but that it was commendable for the representatives of the contractors to demand an amendment which, if agreed to, would reduce the take-home pay of the workmen. Why were the contractors seeking an amendment if no amendment was needed?

On page 26 of their Brief, Appellee's counsel quote the provisions of the contracts entitled "Other employees and sub-contractors" and call attention to the provision reading, "There shall be no special job assignments." That reference to special job assignments, of course, refers to special job assignments *within the area covered by the contracts*. If the contracts in their entirety do not include and were not intended to include the Hanford area, obviously that particular provision cannot be given a broader application than the contracts as a whole.

Appellee's counsel make no attempt at all to answer

our Specification of Error VI discussed in the Opening Brief at pages 41 and 42. That assignment has to do with the fact that when the contract (Exhibit 3) between Associated General Contractors and the Operating Engineers Local 370 was being negotiated, Mr. Dewey Murrow was chairman of the Contractors' Negotiating Committee and specifically on November 3, 1955, he stated that they were not then negotiating with respect to the Hanford area at all because the Hanford Works Agreement (Exhibit 6) was still in effect and covered that area.

Under cross-examination by Appellee's counsel, Mr. Rossman stated:

> "Q. *All right, then, I get back to my first question. What are you relying on?*
>
> A. *I am relying on statements made by members of the A.G.C. labor committee during negotiations that we weren't talking about Hanford when we were talking about an area agreement.*
>
> Q. *Thank you. Now we understand each other.*" (Tr. 647)

Later, when the Appellants offered to prove by Mr. Rossman that Mr. Murrow, Chairman of the Contractors' Committee, did make that statement, an objection by Appellees' counsel was sustained by the Court. The offer of proof made at this time appears in the record at pages 694-695 and reads:

> "THE COURT: Yes, I will sustain the objection, but I see no reason why you couldn't make an offer of proof as to what this witness would testify if permitted to do so.
>
> MR. ETTER: From now on, that's right.

THE COURT: Yes.

MR. ETTER: I now offer to prove your Honor, in view of the objection and the Court's ruling, that if the witness were permitted to testify, he would testify as follows:

"That a discussion was held at this particular meeting, referring to November 3rd, 1955, at which the named persons were present in a contract negotiation meeting between the Associated General Contractors and the defendant union Engineers No. 370, and at that time during this discussion there was discussed Article II, Territory and Work Covered, and that the witness would testify that the group indicated that there should be a clarification about a part of Article II with reference to Idaho County, north half, and that likewise during that discussion with respect to that clarification, there was a suggestion for clarification of the relationship of the proposed contract to the Hanford Agreement, and that at that time one of the representatives of the Associated General Contractors, Mr. Dewey Murrow, stated to the Engineers and to those present that the Associated General Contractors were in no wise interested in the Hanford Project and were not negotiating on any conditions for the Hanford contract because it was an old agreement to which different fringe benefits were attached."

It is difficult to understand how Appellee's counsel can now assert that there is not a word of evidence in the record to show what the parties had in mind (Appellee's Brief, page 3) in the face of the fact that the Appellants offered to make that very proof and were prevented from doing so by Appellee's objection.

In concluding the discussion of this particular point, it is worthy of notice that neither Mr. Sam C. Guess, who executed the two contracts on behalf of Associated General Contractors, nor Mr. Lee Knack, Appellee's Director of Labor Relations, nor anyone else representing the Appellee, claims to have ever discovered prior to April 27, 1956, that the two contracts executed on December 19, 1955, and December 24, 1955, and in effect on January 1, 1956, *as written and without amendment,* had any application to the Hanford area. The work stoppage occurred on March 22, 1956. Thirty-six days later Appellee's counsel wrote the letter now in evidence as Exhibit 50. Mr. Knack testified (Tr. 297-299) that was the first time anyone directly representing the Appellee ever made any claim that the two contracts in question were applicable to work which, since the prior November 28, 1955, was being performed by Appellee under its contract of November 25, 1955 (Exhibit 1) with the Atomic Energy Commission. We find no explanation of this curious circumstance in Appellee's Brief.

REPLY ARGUMENT RE POINT III-A

This Specification of Error is discussed in the Opening Brief (pages 43-46) and in the Appellee's Brief (pages 29-35). We cited *Ketcher v. Sheet Metal Workers,* 115 F.Supp. 802, a decision of the United States District Court for the Eastern District of Arkansas, as authority for the proposition that the Appellee, not having executed either of the contracts, lacks the right to claim damage for their breach. The Appellee cites *Farina Bros. Co. v. United Brotherhood of Carpenters,*

152 F.Supp. 423, a decision of the United States District Court for the Massachusetts District, which is directly to the contrary. So far as our research discloses, there is no Appellate Court decision on the precise point. We do not claim, as Appellee's counsel imply, that a principal can never make a binding contract through an agent or that a contract may not be made for the benefit of a third party. The point of our argument is that, as stated by the trial judge (Tr. 201- 202), proof of membership in the Association was sufficient to justify the admission of the contracts in evidence but some additional proof was essential to show what rights Appellee acquired when it became a member of the Association. No such proof was made. The Finding of Fact quoted in Appellee's Brief, page 32, goes no further than to state that in February, 1955, the Appellee became a member of the Associated General Contractors. There is no Finding as to what rights mere membership conferred. There could be no Finding on that question because no evidence on that question was introduced.

REPLY ARGUMENT RE POINT III-B

This Specification of Error concerns the commitment made by Mr. Lee Knack, Appellee's Director of Labor Relations, at the pre-job conference at Pasco on January 5, 1956, to continue existing working conditions under the Hanford Works Agreement. This question is discussed in the Opening Brief, pages 46-51, with a detailed abstract of the evidence in Appendix IV, Opening Brief, pages 100-116. Appellee's counsel purport to discuss it in their Brief, pages 35-43. The

fact that the commitment was made is not disputed. Mr. Ramon E. Reed, Appellee's Project Manager, testified that he accompanied Mr. Knack to the pre-job conference and remembered that the matter of continuing isolation pay and bus transportation was discussed, although he did not remember the "exact wording" (Tr. 416-417). Charles J. Knapp, a defense witness, both on direct examination (Tr. 479-483) and on cross examination (Tr. 525-529) testified positively that the commitment was made. William H. Dunn, who represented the Operating Engineers Local 370, testified that the commitment was made (Tr. 560). Arthur A. Rossman, business Manager of Operating Engineers Local 370, also testified that the commitment was made (Tr. 621-622). Harold Edward Clary, who represented the Painters Local Union 427 at that pre-job conference, testified that the commitment was made (Tr. 669-671), as did also Lawrence R. King, who represented the Millwrights and Machinery Erectors Local Union 699 (Tr. 672-675). But what is conclusive is that Mr. Knack himself admitted that he did make the commitment, not only to the representatives of the Unions, but also to Mr. Thurston of the Atomic Energy Commission. His evidence on the question appears in detail in the Opening Brief, pages 108-116, and it would serve no purpose to repeat it here, except to again point out that in response to questions propounded to him on cross examination by counsel for Operating Engineers Local 370, Mr. Knack not only admitted that he made the commitment but said, "I didn't qualify it" (Tr. 714-715).

Appellee's counsel attempt to escape the effect of Mr. Knack's admission by calling Mr. Knapp an unre-

liable witness (Appellee's Brief, page 40). If Mr. Knack had denied making the commitment, a question of credibility would have been presented to the trial judge. But he did not deny it. On the contrary, he admitted it, so that the evidence is uniform from the witnesses on both sides that at that meeting Mr. Knack, speaking for the Appellee, agreed to continue the payment of isolation pay and the furnishing of bus transportation as it had been doing from the time it started work on November 28, 1955. Whether the commitment was made at the end of the meeting or at the beginning of the meeting or at some intervening hour or minute is obviously immaterial.

The trial court had no difficulty in disposing of the objection repeatedly made during the trial by Appellee's counsel that the commitment made by Mr. Knack to Mr. Knapp was not repeated to each of the representatives of the dozen or more Unions who were present at that meeting. Mr. Knapp was the spokesman for all and asked the question on behalf of all. In this connection the trial judge said:

> "... I assume that the employer is realistic enough to understand that those people are there representing their unions and what is said in behalf of one applies to all of them; ..." (Tr. 618)

Here, as elsewhere in their Brief, Appellee's counsel suggest that the case should now be decided by a critical construction of pleadings rather than on the basis of undisputed facts. This proposal was made to the trial judge repeatedly but he had no difficulty in disposing of it. He said:

> ". . . I think that the issue should be determined upon the evidence rather than upon too critical a construction of the pleadings . . ." (Tr. 377)

and later he said:

> "Now, I think that one thing that perhaps impresses me and that is that counsel on both sides, I think, are placing too much emphasis on the pleadings, and I will include in that the interrogatories and the answers. The interrogatories and answers have no higher status than the pleadings in the case, and even though admissions may be made in there, if counsel thinks it is in the interest of his client and in accord with the actual facts and the testimony and the evidence that is to be adduced, he has a right to ask for an amendment, regardless of whether it is consistent with his prior pleadings or consistent with his prior admissions, and the whole spirit of modern trial work, as outlined in the Rules of Civil Procedure, is to have lawsuits tried and decided on the evidence and not on the pleadings, . . ." (Tr. 463)

The trial judge then quoted from Rule 15 of the Rules of Civil Procedure which provides for amendments of pleadings to conform to the evidence. That rule specifically states:

> ". . . but failure so to amend does not affect the result of the trial of these issues."

The rule further provides that if evidence is objected to on the ground that it is not within the issues made by the pleadings, the Court may grant a continuance to enable the objecting party to meet such evidence. No request for continuance was made by the Appellee. The evidence admitted was, however, within

the trial amendment quoted in the Opening Brief at page 10.

POINT IV RE JOINT AND SEVERAL LIABILITY

This specification of error is discussed in our Opening Brief, pages 51-57, and in the Appellee's Brief, pages 51-55. It should be borne in mind that in this case jurisdiction was invoked solely under Section 301 of the Labor Management Relations Act of 1947 quoted in the Opening Brief at page 2. That section gives the United States District Courts jurisdiction over "suits for violation of contracts between an employer and a labor organization . . . without respect to the amount in controversy or without regard to the citizenship of the parties." That grant of a special contract jurisdiction is so clear that it cannot possibly be construed as conferring any jurisdiction in tort actions.

The Appellee does not pretend to challenge the applicability of the authorities we have cited holding that there can be no joint and several contractual liability in this case, in which the Engineers Local 370 is not a party to the Teamsters' contract (Exhibit 2) and the Teamsters Local 839 is not a party to the Engineers' contract (Exhibit 3). On the contrary, at page 54 of their Brief, they admit that they cannot question the authorities we have cited under this specification of error. Thus they admit that the judgment as originally entered on April 14, 1958 (Tr. 144-148) which by its terms purports to give the Appellee a joint and several judgment for a lump sum against both Unions, is not within the jurisdiction granted by the jurisdictional statute which they invoke. In their Brief, page 51, they

print the amendatory order of May 8, 1958 (Tr. 171-174) but they wholly fail to point out how the substance of that amendatory order differs from the substance of the judgment as originally entered. A judgment awarding a lump sum against two defendants and providing that the plaintiff may collect what it can from one and the deficit, if any, from the other, is a joint and several judgment, whether it is so labeled or not.

They say (Appellee's Brief, page 52) that "The record is uniform in establishing that in all acts leading up to, during and continuing to and including the end of the strike, the Appellants acted in concert and jointly." This obviously is an attempt to convert an action for breach of contract into an action for tort. Section 301 grants jurisdiction for breach of contract only.

> *Garmeada Coal Company v. United Mine Workers* (District Court of Kentucky) 122 F.Supp. 512;
>
> *Square D. Co. v. United, etc.* (District Court of Michigan) 123 F.Supp. 776;
>
> *Rock Drilling, etc., v. Mason* (Court of Appeals, 2d Circuit) 217 F.(2d) 687.

Appellee's counsel suggest that unless this Court will expand the limited jurisdiction conferred by Section 301 of the Labor Management Relations Act of 1947, an "illogical" situation may result. This is a bald proposal that this jurisdictional statute be expanded to include tort actions as well as contract actions because it is said otherwise an employer in the position of the Appellee might be left without an adequate remedy.

That is not true but, even if it were true, it would not justify the District Court, nor this Court, in attempting to exercise a jurisdiction not granted by the Act of Congress. The fact is, however, that an employer in the position of the Appellee would not be left without a remedy in the hypothetical case suggested. If these two Unions, without justification, had combined, conspired or confederated together to obstruct the execution of the Appellee's contract with the Atomic Energy Commission, by so doing they would have committed a common law tort. For that tort the Appellee would have an adequate remedy by suing in any court of competent jurisdiction. It could sue in the District Court under 28 U.S.C.A., Section 1332, if it could satisfy the requirements of that section respecting diversity of citizenship. If it could not satisfy the requirements of that section, then the courts of Washington were open to it. It was so held in *United Construction Workers v. Laburnum Construction Co.,* 347 U.S. 656, 98 L.ed. 1025, a case substantially identical with the hypothetical case posed by Appellee's counsel. The same ruling was later made in *International Union etc. v. Russell,* 356 U.S. 634, 2 L.ed.(2d) 1030, decided May 26, 1956. An adequate remedy to recover damages resulting from a conspiracy to unlawfully obstruct the performance of Appellee's contract was available in the courts of Washington, especially because in Washington unincorporated labor unions can be sued as entities.

The Appellee cannot meet this objection by conjuring up a hypothetical case, nor can it demand that this Court amend and expand a jurisdictional statute. It

neither segregated the damages as between the two defendants nor did it prove that a segregation could not be made.

REPLY RE SPECIFICATION OF ERROR III-C

This Specification reads:

> "(c) If Morrison-Knudsen Company, appellee, is a party to the two labor contracts which it now claims became applicable to its work in the Hanford area, nevertheless, it wholly failed to comply with the provisions of those contracts by making written demand for arbitration when the dispute arose respecting its commitment to continue to pay isolation pay and to furnish bus transportation." (Opening Brief, page 16)

The Appellee brought this action for damages, claiming that the two labor contracts (Exhibits 2 and 3) effective January 1, 1956, were applicable to the Hanford area and that the Unions breached them when on March 22, 1956, the employer refused to longer furnish bus transportation which it had been furnishing since the work started on November 28, 1955. The alleged breach, according to Appellee, was a failure of the Unions to observe the provisions of the contracts relative to "Settlement of Disputes and Grievances." The Appellants by their answers denied that the contracts were applicable to the Hanford area and denied that there was any breach of either of them. After a long period of negotiation during which the Appellee was demanding an amendment of the contracts to make them applicable to the Hanford area, the parties reached a stalemate on March 16, 1956, when the Unions declined to accept the contractors' proposed amend-

ment. There is not the slightest suggestion of proof that when that stalemate occurred at that time the Appellee *in writing* and *within ten days* demanded arbitration as required by Article X of the Engineers contract (Exhibit 3) and Article IX of the Teamsters contract (Exhibit 2). Yet the Appellee is claiming damages for the alleged failure of the Unions to comply with the provisions of the contracts that the Appellee itself ignored and the very purpose of which was to prevent litigation. The only answer the Appellee's counsel make in their brief to our argument on this issue is:

> "There was no pleading presented to the Trial Court tendering the issue, or was there proposed by Appellants any Finding of Fact or Conclusion of Law in support of such contention. The matter stands therefore in the category of a defense raised for the first time in the Appellate Court." (Appellee's Brief, page 44)

It is difficult to imagine a more flagrant mis-statement of the record. So far as pleadings are concerned, the issue was raised by the Appellee's allegation that these provisions of the contracts were breached by the Unions and the Unions' denial of that allegation of the complaint. The statement that no proposed Finding of Fact was submitted to the Trial Court in support of this contention can only be accounted for upon the assumption that Appellee's counsel has not taken the trouble to read the record.

Although Rule 52(a), Rules of Civil Procedure, provides that: "Requests for findings are not necessary for purposes of review . . .", the fact is that the Appellants

did make requests which appear in the printed record, Volume 1, pages 149-168. Requested Finding XX states:

> ". . . The contract dated December 19, 1955, between Associated General Contractors and Teamsters Local 839 contained a provision reading:
>
> " 'Article IX—Settlement of Disputes and Grievances
>
> " 'Section 1. If a dispute involving the application or interpretation of the Agreement shall arise (other than jurisdictional disputes) written notice of the same shall be promptly (in no event later than ten (10) days) given by the offended party (either Contractors or the affected Union) to the other. If the two (2) parties are unable to adjust the same within forty-eight (48) hours, the dispute shall be settled by the following procedure * * * ' (Plaintiff's Exhibit 2, page 11)
>
> "The contract dated December 24, 1955, between Associated General Contractors of America, Inc., Spokane Chapter, and Operating Engineers Local No. 370 contained an identical provision relative to procedures for the settlement of disputes and grievances. (Plaintiff's Exhibit 3, page 9)
>
> *"There is no evidence from which the court can find that when the dispute arose between the plaintiff and the defendant Unions the plaintiff, by written notice or otherwise, invoked the settlement procedures provided in both of said contracts."* (Tr. 161-162)

This and other findings requested were refused by the Trial Court because to make any of them would require that the Appellee's action be dismissed. The

Court so stated in its order entered on April 21, 1958 (Tr. 169).

The trial of the liability issue commenced on June 10, 1957 (Tr. 179), and after going over a week-end was not concluded until June 19, 1957 (Tr. 779). Nevertheless, the Appellee's counsel now claim that the trial judge did not know by pleadings or otherwise what issues were being tried.

We agree with Appellee's counsel that the less said the better concerning the activities of Professor McCaffree, who ceased to be Executive Secretary of the Hanford Contractors Negotiating Committee in October, 1954, but who nevertheless, until March 8, 1956 (Exhibit 10), continued to write letters on the letterhead of that Committee and signed those letters as its Executive Secretary.

In their Brief, page 3, Appellee's counsel intimate that on the oral argument they may supply some further background necessary to a full and complete understanding of the issues presented. We suggest that when that time comes, without equivocation or evasion, they answer these questions relating to liability:

(1) Do you claim that there cannot be a Federal enclave within the meaning of Article I, Section 8, of the Federal Constitution, unless the Federal jurisdiction is so completely exclusive that the state within whose boundaries the enclave is situated cannot reserve any jurisdiction for any purpose, or is it sufficient that the state reserves only such jurisdiction "as is not inconsistent with the jurisdiction ceded to the United States" as the Washington statute of 1939 provides?

(2) What significance, if any, do you accord to the President's Executive Order No. 9816 of December 31, 1946, vesting *full jurisdiction* in the Atomic Energy Commission and the confirmation of that Executive Order by Section 241 of the revised Atomic Energy Act of 1954?

(3) If, as you state on page 3 of your Brief, there is not a word of evidence in the record to establish that when the contracts were being negotiated the parties did not intend to exclude the Hanford area, how do you justify the exclusion of the evidence offered by the Appellants and on your objection rejected by the Court?

(4) If the two labor contracts as executed on December 19, 1955, and December 24, 1955, and effective January 1, 1956, as written, were intended to include the Hanford area, why was the Contractors Committee headed by your witness, Mr. Sam C. Guess, its Executive Secretary, up to and including March 16, 1956, bending every effort to obtain an amendment to make those contracts applicable to the Hanford area?

(5) Do you claim that Section 301 of the Labor Management Relations Act of 1947 confers on the United States District Court jurisdiction in tort actions as well as jurisdiction in suits for violation of contracts?

(6) If the jurisdictional statute which is the basis of your action does not confer jurisdiction in tort actions, what is the basis of your claim that the Appellee is entitled to a joint and several judgment?

REPLY ARGUMENT RE DAMAGES SPECIFICATION OF ERROR V

Responding to Appellee's argument on damages re "General Administrative Expense," it is to be noted that Appellee urges acceptance of a formula based upon "average daily scheduled revenue" and argues the soundness of its estimates supporting the claim and allowance made for "Efficiency Loss for Labor and Extra Cost Materials" (Appellee's Brief, pp. 60, 62, 63). Appellee's criticism of Appellants' argument claims, that because all progress of Appellee, and therefore all revenue was stopped by the work stoppage, the position of Appellant in denying administrative expense falls of its own weight.

It should first be pointed out that Appellants' argument is directed to the foundation of erroneous estimates and projections used by Appellee up to the date of work stoppage when it was $227,000 behind its projected revenue schedule. To claim, as Appellee does that approval of Appellants' objections to the court's allowance for administrative expense, would be to permit Appellants to profit from their own wrong, injects a proposition which has nothing to do with the basis of Appellants' argument. We confine the factual basis of the issue, to the erroneous projections and estimates of the Appellee as they existed at the time of the work stoppage and not beyond. If the projection of Appellee were so far wrong at the time of the work stoppage, by what method of reasoning does Appellee suggest its projection thereafter should assume a newfound validity?

A close examination of the transcript of record leads us to believe that the Appellee's position is considerably more unsound in its claim for damages based upon its estimates than it has heretofore been. Mr. Alfred J. Goade, the Assistant Comptroller in charge of accounting administration for the Appellee, was recalled for further testimony on February 27, 1958, after Appellants had rested (Tr. 1223). During his examination, the following questions and answers appear in the record:

> "Q. Well, you said that in Plaintiff's Exhibit 56 that as far as the mechanics of the computation, that it is correct mathematically, but you say the fact that they considered excess concrete is of no consequence. Now, I want to know if you say that is of no consequence, what effect, if any, does it have upon the accuracy of Plaintiff's Exhibit 33, the per yard determination there made?
>
> A. Well, I don't believe that the computation that they made is sound, basically sound accounting-wise.
>
> Q. And why is that?
>
> A. Well, because they have used figures that were based, in the first place, on an engineers' estimate and not on actual cost."

Substantially the whole claim of Appellee for its claimed efficiency loss for labor and extra materials, and its claim for general administrative expense, is bottomed on its engineer estimates and projections of scheduled revenue.

Although Appellee has argued that the excess labor costs arose because of the necessity of training crews,

etc., and that the excess material costs arose, in part, out of the costs of new forms, it is plain to see that if such additional costs were incurred they were minor and not in the substantial amount claimed in Appellee's total computation of excess costs. Plainly, the formula used by the Appellee gave no consideration whatsoever to the fact that the additional costs arose principally from the excess material and labor required over and above the very engineering estimates upon which Appellee took the job. Appellee claims its estimates are a reasonable and fair method of computation when Appellee uses them, but denounces as unsound a sounder method of computation used by the Appellant. And though Appellee can find its computation based upon "average daily scheduled revenue" to be sound when used by it (Appellee's Brief, p. 60), it is highly critical of a formula which insists that computation shall be made from the average daily *receipt of revenue* rather than the average daily scheduled revenue. We shall leave this argument where we find it.

We note in Appellee's brief that it neither answers nor considers Appellants' charge that because recovery of loss of profits and expenditures involves a double recovery, it cannot stand. There is no reference in Appellee's Brief to the argument of Appellants based upon the rule of law set out in Appellants' Brief (See Appellants' Brief, pp. 63, 64).

Appellee should not recover rental values for its machinery based upon A.G.C. and A.E.D. rental rates. The operation of Appellee's business and the facts and circumstances surrounding the charges made by Ap-

pellee to the Hanford job clearly distinguish the situation from Appellee's cited case of *Brand Inv. Co. v. United States,* 58 F.Supp. 749, cert. denied 324 U.S. 580. Appellee's central pool of machinery was operated as an adjunct of Appellee's business. The rental value of any machinery, other than charges made to the job, which was maintained or kept at the Hanford project would be wholly conjectural and speculative. Until the action of Appellee was commenced the items of rental charged in the accounting procedures of Appellee were the actual charges made by Appellee to its project, which had been used by Appellee in bidding the job at a figure which included profit. The Court's allowance of additional rental and profit should not be sustained.

Respectfully submitted,

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